NO. 47835-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD WILKINS,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Wilkins' convictions should be affirmed because:

(1) His convictions for Rape of a Child in the First Degree and Child Molestation in the First Degree did not violate double jeopardy because each crime contained distinct elements and the act of sexual intercourse involved penetration;

(2) Wilkins waived his claim of misconduct when he did not object during the prosecutor's closing argument and rebuttal;

(3) The trial court did not abuse its discretion when it did not redact the video evidence of N.H.'s interview, when Wilkins' did not properly object and the non-specific, qualified statements of the child were indicative of her state of mind rather than prior bad acts;

(4) The exhibit Wilkins claims his attorney was ineffective for not objecting to was not admitted during the trial;

(5) Because the State has not sought appellate costs, the appellate cost issue is not before this Court.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

A. Did Wilkins' Rape of a Child in the First Degree and Child Molestation in the First Degree convictions violate double jeopardy when each crime contained an element independent of the other and the act of sexual intercourse involved penetration?

B. Did Wilkins waive his claim of prosecutor misconduct by failing to object at trial?

C. Did the trial court abuse its discretion when it did not redact N.H.'s video-taped interview, when Wilkins did not properly object and the non-specific, qualified

statements of the child were indicative of her state of mind rather than prior bad acts?

D. **Did Wilkins suffer ineffective assistance of counsel when the evidence he challenges was never admitted?**

E. **Should the Court of Appeals rule on appellate costs when the State has not sought them?**

III. STATEMENT OF THE CASE

N.H. was born on July 8, 2004. RP at 364. On March 15, 2008, her mother, Kyra, married Edward Wilkins. RP at 365. Wilkins began living with N.H. and her mother a few months prior to the marriage. RP at 365. After approximately a nine-month relationship, Wilkins' and N.H.'s mother's relationship ended. RP at 366.

In March of 2008, three-and-a-half-year-old N.H. came to her mother and complained that her stomach was hurting. RP at 370. A week later, N.H. came to her mother again saying her privates hurt. RP at 370. On March 16, 2008, accompanied by Wilkins, Kyra took N.H. to the hospital. RP at 371, 465. After N.H. was examined, Wilkins was asked to leave the room. RP at 371. At this time, the medical staff informed Kyra there were signs of penetration and that N.H. possibly had herpes due to a blister observed. RP at 372. N.H. was tested and found to have genital herpes. RP at 466. Kyra was informed that N.H. had genital herpes and that this strongly suggested sexual abuse. RP at 373, 469. This was

because unlike oral herpes, genital herpes is transmitted from direct genital-to-genital contact.[1] RP at 459, 469.

At the time, Wilkins, who lived with N.H. and would watch her while Kyra was at work, was the only person around N.H. that Kyra would have suspected. RP at 365, 369, 374. When Kyra attempted to discuss the matter with Wilkins he would change the subject and get angry. RP at 374.

Eventually, Kyra took N.H. with her and moved to Idaho. RP at 375. After moving to Idaho, N.H. had constant nightmares about Wilkins and wet her bed. RP at 376. Due to the issues N.H. was having, she was placed in counseling. RP at 391-92. N.H. was interviewed by a forensic examiner in Idaho in 2011, but no disclosure was made. RP at 392. At her 2011 interview, N.H. stated, "[I] [d]on't want to talk about it." RP at 407. N.H. was interviewed again by a forensic examiner in Idaho in 2014. RP at 392. During her 2014 interview with forensic examiner Ann Tierney, N.H. was reluctant to speak, said she was embarrassed, and cried throughout the interview.[2] RP at 410, 416. N.H. was able to describe Wilkins' taking her to the bed in her mother's bedroom, that her siblings

[1] Because three-and-a half year old children do not engage in legal genital-to-genital contact, N.H.'s outbreak of genital herpes was strong evidence of sexual abuse. RP at 469.

[2] Reluctance is common for child victims of sexual abuse who often do not want to talk about the specifics of the alleged abuse. RP at 415.

were outside the room playing, that there were pictures in the room, that the curtains were shut, and that when Wilkins' received a call his phone was buzzing and singing. RP at 416-17. N.H. disclosed that Wilkins had sex with her, and explained by this she meant his "bad spot . . . went up mine." RP at 415, 421. N.H. identified Wilkins' "bad spot" as his penis. RP at 423. N.H. identified her "bad spot" as her vagina. RP at 424.

On August 6, 2013, Wilkins was treated by Physician Assistant Christine Bunnell for a problem with his knee. RP at 484, 489. Toward the end of this appointment, Wilkins reluctantly told Bunnell, "I have a problem down there." RP at 489. He then told Bunnell he had painful bumps on his penis. RP at 490. She examined him and observed several excoriated blisters that had been broken open and scabbed over on his penis. RP at 490. A blood test confirmed Wilkins had herpes. RP at 492-93. Because Wilkins' outbreak was more severe than would be seen for oral herpes and was located on his penis, Bunnell concluded Wilkins had genital herpes. RP at 493. Wilkins asked Bunnell how he would have gotten genital herpes. RP at 491. She told him that it was sexually transmitted. RP at 492. Wilkins indicated that he was surprised because he said he had not been sexually active for the last two years. RP at 492.

In April of 2014, Detective Charlie Meadows of the Longview Police Department was contacted by a detective from Idaho regarding

N.H. RP at 508. The Idaho detective later informed Detective Meadows that N.H. had disclosed during a forensic interview that Wilkins had raped her. RP at 509-10. Detective Meadows obtained N.H.'s medical records indicating she was diagnosed with genital herpes in March of 2008. RP at 509. Detective Meadows then obtained a search warrant for Wilkins' medical records, which revealed that Wilkins had herpes. RP at 510-511.

Detective Meadows contacted Wilkins on October 6, 2014, and advised him of his constitutional rights. RP at 511-12. Wilkins told Detective Meadows he had been married to Kyra in 2008, and that he had lived with her and her four children at a residence in Longview. RP at 512-13. Detective Meadows asked what Wilkins what he would say if the detective told him he was working on a case involving Kyra. RP at 513. Wilkins responded he thought it might have something to do with N.H. RP at 513.

After Detective Meadows confirmed it was about N.H., he asked Wilkins why he thought the case would involve N.H. RP at 513. Wilkins then told Detective Meadows that shortly after his honeymoon with Kyra, they had taken N.H. to the hospital for abdominal pain. RP at 513. Wilkins also said that N.H. was examined by a doctor, was diagnosed with herpes, and he was asked to leave the room. RP at 514. Detective Meadows told Wilkins he had been diagnosed with the same form of

herpes as N.H. RP at 514. Wilkins acknowledged this was true. RP at 515. Wilkins told Detective Meadows that the diagnosis "wasn't enough evidence." RP at 515. Detective Meadows told Wilkins that genital herpes was passed via intercourse and not casual contact. RP at 515. Wilkins told him other people exposed N.H. to herpes. RP at 516.

A *Ryan* hearing was held; N.H.'s forensic interview was admitted on the condition that the entire interview be played so that the jury would be given the opportunity to fully evaluate her credibility. CP at 8.

After the *Ryan* Hearing but before trial began, the State sought to admit evidence of Wilkins' prior sex offense conviction under ER 404(b). RP at 192-93, CP at 47. A hearing was held on the admissibility of the evidence of his prior conviction, the court found the evidence did not possess the substantially high degree of similarity required for admission as a common plan or scheme and refused to admit this evidence. RP at 228-29. Part of the court's rationale in refusing to admit this evidence was that the victim in Wilkins' prior case had been significantly older than a N.H. RP at 225-26.

Later, when bringing motions in limine, Wilkins' attorney stated that comments by N.H. during the forensic interview "may be contradictory" to the court's earlier ER 404(b) ruling. RP at 267. Wilkins' attorney said admissibility "may depend on how the court

classifies the statements." RP at 267. Wilkins' attorney identified these statements as N.H. saying he had done bad things to kids and had probably had sex with other kids.[3] RP at 267-68. Wilkins' attorney indicated that whether the statements were admissible was dependent on how the statements were classified, and said he had concerns about their admissibility given the court's prior ER 404(b) ruling. RP at 268. Wilkins' attorney indicated he did not know whether or not this was an objection for the record given the court's ER 404(b) ruling. RP at 268.

The court distinguished N.H.'s statements from the previously excluded prior bad act evidence by explaining that it was understandable that a nine-year-old who believed she was hurt by a person would also believe that person would be a bad person, who did bad things to others. RP at 271. The court recognized children, such as N.H., tend to "horrible-ize things" and jump from "A to Z" in their minds and from what they hear from adults. RP at 271-72. Because there was no showing this was the same evidence that was presented at the ER 404(b) hearing, the court

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[3] N.H's first statement was: "Well, he is a bad, bad, bad, bad person. He does bad things to kids. And, well, he did a very bad thing to me. [Okay.] Well, you said Eddie is a bad person? [....Tell me all about Eddie being a bad person.] Well, he does very bad things to kids." RP at 301-02.
Her second statement was: He's done it to other kids, too. And I don't want him doing that to any more kids. That's what I know.... [Okay. And you said that he's had sex with other kids?] Yes, he's done it to a lot of kids, too. [Tell me more about him doing it to a lot of kids, too.] Well, he's probably done it to littler kids, like my age. [Okay.] Or litter, or bigger. That's all I know about him. RP at 303-04.

explained it was distinct from the prior conviction evidence that had been excluded by its prior ruling. RP at 272. No further objection was made to this evidence. RP at 272.

IV. ARGUMENT

A. BECAUSE RAPE OF A CHILD IN THE FIRST DEGREE AND CHILD MOLESTATION IN THE FIRST DEGREE EACH CONTAIN DISTINCT ELEMENTS, DOUBLE JEOPARDY WAS NOT VIOLATED.

Because Rape of a Child in the First Degree and Child Molestation in the First Degree each contain independent elements and the act of sexual intercourse involved penetration, Wilkins' convictions do not violate double jeopardy. The Court of Appeals has stated:

> Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the 'same offense' for double jeopardy purposes.

State v. Jones, 71 Wn.App. 798, 825, 863 P.2d 85 (1993). Wilkins' convictions for Rape of a Child in the First Degree and Child Molestation in the First Degree were based on a single act of penetration. At sentencing the parties agreed that these two crimes should be considered same criminal conduct. RP at 631-32. The court found that they were

same criminal conduct and did not count the crimes against each other when calculating Wilkins' offender score. RP at 631-32. Wilkins now contends that the two convictions based on a single incident violate double jeopardy. However, a single incident of penetration done for purposes of sexual gratification allows for the convictions of both rape of a child and child molestation without violating double jeopardy.

The double jeopardy clause of the constitution protects a defendant from a second trial for the same offense and against multiple punishments for the same offense. *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) (citing *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)); See also, *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Offenses committed during a single transaction are not necessarily the "same offense." *Id.* (citing *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973)). To be the same offense for double jeopardy purposes, the offenses must be the same in law and fact. Id. "If there is an element in each offense which is not included in the other, and the proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." Id.

"Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation." *State v. Land*, 172 Wn.App. 593, 600, 295 P.3d 782 (2013). This is because "the touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape."[4] Id. Consequential to the double jeopardy analysis is whether the State seeks to impose multiple punishments for the same offense. See *Land*, 172 Wn.App. at 603.

When a jury convicts a defendant of both rape of a child and child molestation based on the same incident, then these crimes may encompass same criminal conduct. *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996), abrogated on other grounds by *State v. Graciano*, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013). Under RCW 9.94A.589(1)(a), when a court finds that two current offenses encompass same criminal conduct, then those current offenses shall be counted as one crime and served

[4] Penetration is distinct from an act of sexual intercourse that is based on contact between the sex organs of one person and the mouth or anus of another. *See* RCW 9A.44.010(1)(c). When sexual intercourse involves a single act of sexual contact between the mouth and sex organs or anus rather than penetration, and this is done for sexual gratification, then rape of a child and child molestation are the same in fact and law because all elements of the rape as proved are included in the molestation and the evidence required to support the conviction for molestation also necessarily proves the rape. *Land*, 172 Wn.App. at 600 (citing *State v. Hughes*, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009));

concurrently. A defendant bears the burden of proving same criminal conduct. *Graciano*, 176 Wn.2d at 538-40. A sentencing court's determination of same criminal conduct will not be disturbed absent an abuse of discretion. Id. at 541.

Here, when Wilkins' penis touched N.H.'s vagina this was done for the purpose of sexual gratification. At this moment, the crime of child molestation was committed. When Wilkins' penis penetrated N.H.'s vagina, he committed the crime of rape of a child. Because rape of a child and child molestation each contain independent elements, Wilkins committed both of these crimes, and as explained by Land, these crimes did not constitute the same offense for double jeopardy purposes. Additionally, because Wilkins' convictions were treated as same criminal conduct, his punishment is no greater than it would have been had he only been convicted of the greater crime of rape of a child. Thus, Wilkins was neither subjected to double jeopardy nor the harm that double jeopardy is intended to prevent. For these reasons, his conviction for child molestation need not be vacated.

B. BECAUSE WILKINS DID NOT OBJECT TO PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT AND REBUTTAL, HIS CLAIM OF MISCONDUCT WAS WAIVED.

Wilkins waived his claim of prosecutor misconduct when he did not object to the prosecutor's closing argument or rebuttal, and the prosecutor's remarks were not improper, much less so flagrant and ill-intentioned that they resulted in enduring prejudice that could not have been cured by an admonition to the jury. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). Although Wilkins did not object to the prosecutor's closing or rebuttal arguments, he now raises a claim of prosecutor misconduct for the first time on appeal. These arguments both fail. First, when Wilkins told Detective Meadows he didn't have enough evidence this was not an exercise of a constitutional right, therefore the prosecutor's argument was proper. Second, the prosecutor's rebuttal argument was in direct response to Wilkins' attorney's attack on the

victim's "word choice," not on appeal to the passion or prejudice of the jury.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell,*

125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 704 (2012). Under this heightened standard, "[r]eviewing

courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, prevail on his misconduct claim, Wilkins must show that the prosecutor's statements were improper. If he can do so, he then must show that these statements were both flagrant and ill-intentioned. He makes no such showing. Additionally, because Wilkins did not object and allow the trial court the opportunity to address the issue, if he is able to show misconduct, he must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Emery*, 174 Wn.2d at 760-61. Because the prosecutor's arguments were not improper, much less flagrant and ill-intentioned, no misconduct occurred. Further, even if the arguments were

improper a curative instruction could have obviated any prejudicial effect, and the statements did not result in prejudice that had a substantial likelihood of affecting the jury verdict.

1. Because Wilkins did not exercise a constitutional right by telling Detective Meadows there was not enough evidence, the prosecutor's argument was not improper, and by not objecting to this argument he failed to preserve this issue for review.

Wilkins did not exercise his constitutional rights by arguing with the detective that he did not have enough evidence, and the prosecutor was entitled to argue a reasonable inference from this evidence; further by not objecting, Wilkins failed to preserve this issue for review. "When counsel does no more than argue facts in evidence and suggest reasonable inferences from that evidence there is no misconduct." *State v. Clapp*, 67 Wn.App. 263, 274, 834 P.2d 1101 (1992), *review denied*, 121 Wn.2d 1020, 854 P.2d 42 (1993). When Detective Meadows confronted Wilkins with the fact that both he and N.H. shared the same sexually-transmitted disease, Wilkins told the detective he did not have enough evidence. This was not an exercise of a constitutional right, and the prosecutor was permitted to argue the reasonable inference that Wilkins was asserting he would get away with the crime. Consequently, Wilkins cannot show the prosecutor's argument was improper. Also, because Wilkins did not

object, the heightened standard of review for prosecutor misconduct applies, and Wilkins fails to meet this standard, that would allow him to raise the issue for the first time on appeal.

"In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

"Not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights." *State v. Gregory*, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.3d 757, 336 P.3d 1134 (2014).

The relevant issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). A prosecutor's statement is not considered a comment on a constitutional right when standing alone the comment was so subtle and brief it did not "naturally and necessarily" emphasize the exercise of that right. *See id.* (citing *State v. Crawford*, 21 Wn.App. 146, 152, 584 P.2d 442 (1978)). A reviewing court will consider whether or not the prosecutor intended the remark to be a comment on the defendant's constitutional rights. *Id.* at 806-07. If the prosecutor's focus is not on the right itself, the remark does not violate the right at issue. *Gregory*, 158 Wn.2d at 807.

Here, when Detective Meadows confronted Wilkins with the fact that both he and N.H. had genital herpes, Wilkins argued with the detective telling him it was not enough evidence. He now claims he was exercising a constitutional right. Yet at trial this testimony was admitted without objection.[5] Once his statement was admitted, the parties were both free to argue reasonable inferences from this evidence. Because Wilkins made this statement in response to incriminating evidence, it could reasonably be inferred that Wilkins was asserting that he would get

[5] Wilkins has not argued that his counsel was ineffective for failing to object; however, because this was not an exercise of his constitutional right, there would be not merit to such an argument.

away with the crime. Wilkins did not ask for an attorney, refuse to answer a question, or even demand a jury trial. Rather, he bickered with the detective. As such, this was not an exercise of a constitutional right.

After explaining that saying "that's not enough evidence" was distinct from claiming he had not committed the crime, the prosecutor's argument was that context made the statement incriminating. Wilkins had just been confronted with the fact that the child who was saying he had raped her had the same sexually transmitted disease that he had. Because three-and-half-year-old children do not normally engage genital-to-genital sexual intercourse, this was considerably more incriminating than had it been said by a sexually active adult. It was Wilkins' arrogant response when confronted with this evidence—in effect acknowledging a crime had been committed but telling Detective Meadows he could not pin it on him—that was especially incriminating. Therefore, the prosecutor's argument was a reasonable inference to be drawn from the evidence and was not improper. Further, there is no showing that this statement was flagrant or ill-intentioned. It was a brief comment made while reviewing the evidence presented during closing argument and was a minor point within the entirety of the prosecutor's closing argument.

Additionally, because no objection to the prosecutor's argument was made at trial, the court did not have the opportunity to provide a

curative instruction. Wilkins has not even argued why a curative instruction would not have obviated any prejudicial effect. If Wilkins had objected to the statement he now claims to have been improper, the court could have instructed the jury to disregard it. Because juries are presumed to follow the court's instructions, and the jury had been instructed that the lawyers' arguments were not evidence, there is no reason to believe a curative instruction would not have been effective. *Kirkman*, 159 Wn.2d at 928; CP at 13.

Moreover, because the evidence was that N.H. had contracted genital herpes while Wilkins was living with her, that Wilkins also had genital herpes, and that N.H. would only have contracted herpes at three-and-a-half-years-old through genital-to-genital contact, her testimony that Wilkins had sexual intercourse with her was strongly corroborated. Accordingly, there was no prejudice from the prosecutor's argument that had a substantial likelihood of affecting the jury verdict. Because Wilkins did not object, his claim was waived.

2. Because the State was entitled to rebut the Wilkins' attorney's assertion that N.H.'s testimony was unreliable based on her "word choice," the prosecutor's response was not improper, and by not objecting Wilkins waived his claim of misconduct.

When the prosecutor responded to Wilkins' attorney's attack on N.H.'s "word choice" by pointing out the difficulty a ten-year-old girl would have in testifying about having been raped and matching the rhetoric of N.H.'s attorney, this was proper; by not objecting Wilkins waived his claim of misconduct. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 p.2d 747 (1994) (citing *United States v. Hiett*, 581 F.2d 1199, 1204 (5th Cir. 1978)). After Wilkins' attorney attacked N.H.'s testimony during closing argument, the prosecutor did not commit misconduct when during rebuttal the prosecutor pointed to the obvious disadvantage a fifth-grader would have in competing rhetorically with Wilkins' attorney.

A prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they are "invited, provoked, or occasioned" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport,* 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte,* 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the

State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g.*, *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . ." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)). Arguing that facts indicate a witness is truthful is not misconduct. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 730, 899 P.2d 1294 (1995). Even strong "editorial comments" by a prosecutor are not improper if they are in response to arguments made by the defendant. *State v. Brown,* 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Here, the remarks Wilkins claims to be misconduct were in response to provocative arguments his attorney had made during closing argument.[6] Wilkins' attorney argued throughout his closing argument that N.H.'s testimony had come from her mother. RP at 568-70, 580, 588-89, 591, 597. He referenced N.H.'s forensic interview to bolster this assertion:

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[6] Wilkins' attorney's arguments were not objectionable, however, once he chose to attack the victim's credibility based on her "word choice," the State was entitled to respond by explaining why a now 10-year-old N.H. would have obvious difficulty describing the rape due to the more limited vocabulary of a child.

> 'We're here to talk about Eddie and the bad things he did to me. He does bad things to kids. He did a bad thing to me. He needs to be stopped.' She says no one told her why she was going there. No one talked to her about Eddie. Her mom says, 'I didn't talk about Eddie,' and that's it.' Somebody has put some very specific thoughts in this kid's head.

RP at 569. He equated N.H.'s non-disclosure, when she refused to speak about having been raped, to denying she had been victimized. RP at 574-75. When N.H. expressed reluctance to discuss the details of her rape, Wilkins' attorney questioned her "word choice." RP at 572. He told the jury to "look at the words she used." RP at 589. Then, he derided her testimony stating:

> What is – what – what did he do to you? He had sex with me. What does sex mean? I don't know. That's all I know. He had sex with me. Push, push. Well, he humped me. That's all I know. What does that mean? Sex with me. What does that mean? Humped me. Well that's all I know. I'm embarrassed. I don't want to talk about it.

RP at 589-90.

After Wilkins' attorney chose to argue that the claim of rape had been put in her head and then questioned her "word choice" to support this assertion, the prosecutor rebutted this claim stating:

> We heard, you know, Defense wants to make a bid deal about Kyra or things – his conversation with her out of court. She explained what she said to her daughter. You heard that in court. You don't know what their conversation was out of court. That's not in front of you.

> And for the child to think that he does bad things when this is what he did to her is not unreasonable, that's not an (inaudible) thing for a child to say. It's not really a fair fight for a defense attorney to parse out a child's words with such great specificity, excuse my words. She's only in the fifth grade.

RP at 600-01. Because Wilkins' attorney had argued that N.H.'s "word choice" of "he does bad things" was evidence that her mother was the source of her allegation, the prosecutor explained that N.H.'s statement "he does bad things," was reasonable for a child who had been raped to believe. The prosecutor responded to the attorney's attack of N.H.'s "word choice" by reminding the jury that as a fifth-grader N.H. would not have been able explain things with the level of detail that would have been possessed by an educated adult. When the prosecutor said "It's not really a fair fight for a defense attorney to parse out a child's words with such great specificity," this was simply pointing out the fact that it would be unfair to evaluate the specific language N.H. used on the same standard of language Wilkins' attorney was demanding. This argument was in direct response to Wilkins' attorney's argument that N.H.'s "word choice" and lack of specific language was why she should be discredited. As such, the prosecutor made a proper argument that did not improperly appeal to passion or prejudice.

The propriety of the prosecutor's argument was obvious in the courtroom, and Wilkins did not object. For this reason he must also show "the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Russell,* 125 Wn.2d at 86. There is no evidence to support the claim that the prosecutor's argument was flagrant and ill-intentioned. The prosecutor's rebuttal statement was only made once, and was not elaborated on at a later time in the argument. More importantly, it was fair response to what Wilkins' attorney had argued.

Yet, Wilkins' brief continually misconstrues the prosecutor's argument in an attempt to show it was flagrant an ill-intentioned. He misquotes the record in two places and takes words in the prosecutor's quote out of context. The prosecutor's statement was: "It's not really a fair fight for a defense attorney to parse out a child's words with such great specificity, excuse my words. She's only in the fifth grade." RP at 600-01. However, in the heading of Part II-B of Wilkins' brief, he places in quotes the prosecutor stated it "*wasn't* a fair fight." *Appellant's Brief* at 15 (emphasis added). Later in his brief, Wilkins again misquotes the prosecutor changing the statement to "...*that's* really not a fair fight to parse out a child's words with such great specificity..." *Appellant's Brief* at 15 (emphasis added). The first problem with these changes is that they

appear to be quoting the record when they do not. The other problem is that these changes in the quotation both give the impression that there was language preceding the phrase "It's not really not a fair fight" when there was not. This creates the false impression that "fair fight" was the ultimate point of the sentence, rather than the parsing of the child's words.

In addition to these changes in quotation, Wilkins' brief continually takes words in the prosecutor's quote out of context. For example, Wilkins' brief uses the words "fair" and "fight" without the rest of the quote to claim, "The prosecutor set the case up as a 'fight' between Mr. Wilkins and N.H. and then argued the fight was 'not fair' because N.H. was a child." *Appellant's Brief* at 16. No such argument was ever made. It is especially noteworthy that Wilkins never explains how the full quote was prejudicial, only these two words without proper context. The phrasing used by the prosecutor simply addressed the reality that a fifth-grader's lack of specificity in language should be evaluated at a reasonable level for her age, and that Wilkins' attorney's superior mastery of the English language should not be a reason to disbelieve her. Of course, this was in the context of Wilkins' attorney having attacked her testimony based on her "word choice."

Wilkins also attempts to bolster his claim that the prosecutor appealed to the passion and prejudice of the jury by arguing:

> You know, [N.H.] had to get in here and testify, at ten years old, about being raped, in front of the man who did it. How difficult would that be? So Defense complains we didn't ask her about her nightmares she was having about it. I think she was in here for long enough.

RP at 606. However, Wilkins leaves out the portion of his closing argument the State was responding to where Wilkins' attorney argued the State should have questioned N.H. about her nightmares about Wilkins:

> There's some interesting stuff in this case. Kyra, the motivated, tells you that her daughter wets the bed, has nightmares, and is afraid of Mr. Wilkins. You know who didn't tell you that? You know who wasn't even asked that by the State? [N.H.] She hasn't told anybody, on the video, Ms. Tierney, you, that she has nightmares, that she has any lasting problems, that anything is wrong in her life. Comes from Kyra.

RP at 580. Thus, Wilkins' attorney suggested N.H.'s nightmares about Wilkins were fabricated by Kyra, and this is why the State did not ask N.H. about nightmares. In response to Wilkins' attorney's suggestion that the State had not asked Wilkins' about her nightmares because she had not had them, the prosecutor pointed out how difficult it would be for a ten-year-old girl to testify about having been raped while in the same room with the man who raped her. With this reality in mind, the prosecutor provided a plausible reason for not asking N.H. about the nightmares she had about Wilkins raping her. Doing so would have unnecessarily put N.H. through further trauma, based on events that had been dreamed.

Because Wilkins argued that the State had not asked N.H. about her nightmares in an effort to suggest she had not had them, it was a reasonable response for the prosecutor to argue for another reason why she was not asked to testify about them.

Additionally, because Wilkins did not object, he must also show that the prosecutor's statement could not have been addressed with a curative instruction and that the alleged misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. If the words "fair fight," regardless of surrounding context as Wilkins now asserts, were of themselves prejudicial, then an objection and a curative instruction would have been sufficient to alleviate any prejudice. Further, because N.H.'s testimony to having been raped by Wilkins was strongly corroborated by the fact that they both shared a sexually transmitted disease that is passed by genital-to-genital contact, it is not reasonable to conclude that the alleged prejudicial statement had any impact on the outcome of the trial. Thus, when he failed to object, Wilkins waived his claim of prosecutor misconduct.

C. BECAUSE STATEMENTS ON THE VIDEO WERE NOT EXCLUDED BY THE COURT'S ER 404(B) RULING, WILKINS FAILED TO PRESERVE THIS ISSUE FOR REVIEW, AND N.H.'S STATEMENTS WERE ADMISSIBLE AS TO HER STATE OF MIND.

Because N.H.'s statements on the video were not a part of the court's earlier ER 404(b) ruling, and Wilkins did not object to them independently under ER 404(b), he failed to preserve this issue for review; further, because the statements were better understood as expressions of N.H.'s state of mind rather than actual instances of prior misconduct, they were not subject to an ER 404(b) analysis. "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Wilkins argument should be rejected for two reasons: First, because N.H.'s statements were not part of the court's earlier ER 404(b) ruling, and the court's earlier ER 404(b) ruling was the sole basis of Wilkins' objection, he failed to preserve this issue for review.7 Second, N.H.'s statements did not introduce any substantive evidence of other bad acts, but rather were indicative of her state of mind, which was relevant to her credibility.

1. Because N.H.'s statements were not included in the court's ER 404(b) ruling, and Wilkins did not object on any other basis at trial, he failed to preserve this issue for review.

[7] In his brief, Wilkins' argues that the prior ER 404(b) ruling prohibited these statements, now he makes the same argument on appeal. *Appellant's Brief* at 18. Yet the court specifically drew the distinction that its earlier ER 404(b) ruling was related to Wilkins' prior conviction rather than N.H.'s statements during the interview. RP at 272. Wilkins is essentially arguing the court's ruling was not the court's ruling.

Because N.H.'s statements were not part of the evidence the court ruled on when the State sought to introduce evidence under ER 404(b), and Wilkins did not object to their admission on any other basis, he failed to preserve this issue for review. "A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence. And a theory not presented to the trial court may not be considered on appeal." *State v. Price*, 126 Wn.App. 617, 637, 109 P.3d 27 (2005). At trial, Wilkins' only objection to N.H.'s statements regarding other children in the forensic interview was that depending on how these statements were classified they may have been in in conflict with the court's earlier ER 404(b) ruling. RP at 267-68. The court explained that the earlier ER 404(b) ruling was with regard to Wilkins' prior sex offense conviction and prior bad acts related to that. RP at 272. Because Wilkins' only objection was that the evidence was prohibited by the earlier ER 404(b) ruling, and this was not the court's ruling, by not raising a specific ER 404(b) objection to the evidence, Wilkins' failed to preserve this issue for review.[8]

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the

[8] Alternatively, Wilkins' attorney's statements may be viewed as a conditional objection, where he asked for an explanation to determine whether an objection was warranted, and after receiving an explanation, chose not to object.

presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *See also* RAP 2.5(a). An error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). The Supreme Court has explained: "This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial. Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts." *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court

to correct them.[9] *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Appellate courts have regularly refused to consider new arguments that were not raised at trial. In *State v. Sims*, 77 Wn.App 236, 238, 890 P.2d 521 (1995), the court refused to hear the appellant's argument that hearsay statements were improperly admitted as excited utterances because the declarant had made inconsistent statements that indicated fabrication, when the argument had not been presented to the trial court, was not preserved for appeal. In *State v. Saunders*, 132 Wn.App. 592, 607, 132 P.3d 743 (2006), trial counsel had objected at trial to admission of the victim's statements as hearsay, but on appeal the defendant argued that the statements included an identification of the perpetrator and thus fell outside the medical diagnosis exception; because this was a new argument against the statements, the court refused to consider it. In *State v. Mathes*, 47 Wn.App. 863, 868, 737 P.2d 700 (1987), trial counsel had objected to the admission of a document as a recorded recollection, arguing the document was not authenticated because the witness had no independent recollection of the events, however on appeal, the argument shifted to a claim the document was not authenticated as the witness had

[9] Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

not signed it. Though the objection remained the same, authentication, the appellate court steadfastly refused to consider the new claim. *Id.*

Although an argument must be raised at trial to be preserved for review, in certain limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration has been satisfied. In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a "manifest error affecting a constitutional right" are not unlimited stating:

> RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be "manifest", otherwise the word "manifest" could be removed from the rule. *Id.* The court explained: "[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary

appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts." *Id.* at 344.

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is "manifest"; an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term "manifest" means "unmistakable, evident or indisputable as distinct from obscure, hidden or concealed." *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Here, Wilkins' only objection at trial was that the evidence may have been prohibited by the court's earlier ER 404(b) hearing, depending on how N.H.'s statements were classified. RP at 267-68. This suggested that Wilkins' attorney did not believe the evidence was inadmissible unless it was classified as part of the evidence at issue in the earlier ER

404(b) ruling. The court explained that its earlier ER 404(b) ruling dealt with evidence that was distinct from N.H.'s references to other children. RP at 272. Wilkins' attorney did not object to this evidence on any other basis. Because Wilkins did not raise an independent ER 404(b) objection to this evidence at trial, he did not preserve this issue for appeal. Thus, for Wilkins to bring this issue for the first time on appeal he would need to show the court's ruling was a manifest error affecting a constitutional right.[10]

Wilkins fails to show a manifest error affecting a constitutional right. First, the evidence admitted suggests an evidentiary question rather than a constitutional issue, thus no constitutional right was involved. Second, the error is not manifest, it was unclear whether N.H.'s statement related to a specific prior incident or was simply a child globalizing what happened to her and assuming that there were other victims. If this was an error that reaches a constitutional question, it only does so in the abstract. And, because Wilkins' argument assumes the ER 404(b) issue was preserved despite his attorney's lack of an independent objection, he does not even provide a constitutional argument. Third, because the error does not suggest a constitutional issue, there are no constitutional merits to

[10] The only issue that Wilkins arguably preserved is that this evidence was included in the court's ER 404(b) ruling. But to rule the issue was preserved would ignore the trial court's autonomy to determine the breadth of its own ruling.

evaluate. Fourth, any error in the admission of this evidence was harmless. Essentially the totality of what N.H. stated was that she believed Wilkins probably had sex with other kids, of whom she did not know the age or identity, and she thought the person who raped her was a bad person. This was not unexpected information from the victim of such a crime, nor would it have been unexpected for a person falsely accusing Wilkins of such a crime, as Wilkins attorney argued the statements showed. Considering the strength of the evidence corroborating N.H., there is no reason to believe N.H.'s statements regarding other children had any impact on the outcome of the trial. *See infra*, Part IV-C-2 at 40-42.

2. Because N.H.'s statements were not evidence of actual prior misconduct but simply her state of mind, it would not have been an abuse of discretion for the trial court to admit them had Wilkins properly objected.

Even if Wilkins had objected to the N.H.'s statements, the trial court would not have abused its discretion in admitting them because they were admissible to show her state of mind, which was crucial to assessing her credibility. "The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse." *State v. Stubsjoen*, 48 Wn.App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d

889 (1984)). Because N.H.'s statements regarding other children were non-specific, qualified, and included her disclosure of her own victimization, they were best understood as a young child globalizing the harm to her. For these reasons, even if Wilkins had properly objected, the trial court would not have abused its discretion in admitting these statements. Additionally, in light of the weight of the evidence against Wilkins, at most their admission amounted to harmless error.

A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). However, for a court to err in deciding an issue, the issue must necessarily be before that court. For example, when evidence is admitted under ER 404(b), the trial court is not required to *sua sponte* provide a limiting instruction when neither party requests such an instruction. *See State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). Further, the standard for admitting relevant evidence is low: "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination more or less probable than it would be without the evidence.' The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." *State v. Gregory*, 152 Wn.2d 759, 835, 147 P.3d 1201 (2006) (quoting ER 401; citing *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

When evidence is not evidence of other crimes, wrongs, or acts, it is not subject to ER 404(b) scrutiny. "ER 404(b) only prohibits the admission of such evidence for the purpose of demonstrating the criminal defendant's character in order to show activity in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 427, 269 P.3d 207 (2012). "ER 404(b) applies only to prior misconduct offered as substantive evidence." *State v. Wilson*, 60 Wn.App. 887, 891, 808 P.2d 754 (1991). (citing 5A K. Tegland, Wash. Prac., *Evidence* § 114 (3rd ed. 1989)). When "testimony was not offered to show the defendant's propensity for violence but was elicited to describe the state of mind of the victim," the Utah Supreme Court has ruled such evidence was not subject to Utah's equivalent of ER 404(b) because "the 'prior bad acts' of the defendant [were] not offered to prove his character or show 'that he acted in conformity therewith.'" *State v. Bates*, 784 P.2d 1126, 1127 (Utah 1989).

Additionally, even when a trial court errs in exercising its discretion, such error may be deemed harmless. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected how the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is

supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy*, 104 Wn.2d at 425. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trail. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 1981); *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *U. S. cert. den.* 115 S.Ct. 2004, 131 L. Ed. 2d 1005.

Here, the trial court did not abuse its discretion when it did not cut out portions of N.H.'s statements relating to other children during the forensic interview. After the *Ryan* hearing, the court, presided over by a different judge than at trial, ruled that for the forensic interview to be played, it must be played in its entirety. CP at 8. The court's ruling expressed a concern that the statements regarding other children were relevant to assessing both N.H.'s and Kyra's credibility. CP at 5-8. Later, Wilkins' attorney objected on the basis that depending on the way the statements were classified, the court's earlier ER 404(b) ruling regarding

Wilkins' prior sex offense conviction may have excluded them. RP at 267-68. The court explained that its ER 404(b) ruling had only been in relation to his prior conviction and prior acts related to that, and distinguished N.H's statements from the evidence at issue in its prior ruling. RP at 272.

The court recognized that N.H.'s testimony suggested a belief in her mind, normal for a young child—that because bad acts had happened to her they would also have happened to others—rather than an actual prior bad act. On this basis, it appeared she had surmised that because he had sex with her, he had also had sex with others. For this reason, N.H.'s statements, which did not identify or specifically elicit any facts regarding other children, went to her own state of mind. Considering the ruling from the *Ryan* hearing, this was important in evaluating her credibility. Further, it was not specific as to any bad acts of Wilkins but was merely a claim of a child who was already claiming to be a victim of a horrific crime. While courts could disagree on how such evidence should be interpreted, the trial court was best-positioned to judge N.H.'s statements in their entirety. It is noteworthy that two different judges considered this evidence and ruled it admissible. The trial court ruled the statements were not evidence of any prior bad act, but only of N.H.'s state of mind, globalizing to others the harm that had come to her. Thus, ER 404(b) was not implicated.

The trial court's ruling was supported by the fact that N.H. qualified her claim that Wilkins had sex with other kids stating: "Well, he's probably done it to littler kids, like my age. [Interviewer: "Okay."] Or littler, or bigger. That's all I know about him." RP at 303-04. From this reference, Wilkins curiously claims N.H. claimed he had "done bad things specifically to an older child[.]" *Appellant's Brief* at 19. This characterization of N.H's statement is flawed. By stating probably, N.H. indicated it was her belief that Wilkins had probably had sex with other kids. Further, by stating "litter kids, like my age...or littler, or bigger[,]" it was clear that N.H. was did not know the identity or age of any other children and simply appeared to be speculating. The court recognized that the self-centered nature of young children would often cause a child who has suffered harm because of the acts of another person to believe the person who caused that harm to be bad, and therefore also do bad things to other children. RP at 271. The court also noted that jurors would be aware of this practical reality. RP at 271. Thus, the trial court found the statement did not actually introduce evidence of a prior bad act, rather the trial court interpreted the evidence as a belief of N.H. that was relevant to assessing her credibility. Accordingly, due to the context, lack of specificity, and equivocal nature of the statements, and the ambiguous nature of Wilkins' objection—which called for the court to classify the

statements, it was not manifestly unreasonable for the court to interpret these statements as it did, and there would not have been error in admitting these statements, even if Wilkins' had properly objected.

Additionally, any error in the admission of these statements would have been harmless. Because the alleged error is evidentiary rather than constitutional, the standard of review for this harmless error analysis is whether there was a reasonable probability that the statements impacted the outcome of a trial. There was not. N.H. testified to Wilkins penetrating her vagina with his penis. This was strongly corroborated by evidence where each of them had a sexually-transmitted disease that is passed by genital-to-genital contact. Unlike oral herpes, N.H. had genital herpes, which is exclusively passed through genital-to-genital contact. RP at 469. At three-and-a-half years old, having genital herpes alone was overwhelming evidence N.H. had been victimized. And, other than her mother, who was tested and did not have herpes,[11] Wilkins was the primary person with access to N.H. at the time she contracted genital herpes. RP at 368, 369, 372. In light of N.H.'s recollection of Wilkins' genital-to-genital contact with her, that Wilkins himself also had a manifestation of genital herpes, was especially incriminating. Thus, there

[11] Dr. Hamill testified that sexual partners only contract genital herpes from an infected partner at a rate of 10% a year; so Kyra's not having herpes was not surprising as she was only in a relationship with Wilkins for about nine months. RP at 461.

is no reason to believe that N.H.'s statements that ultimately amounted to a claim that Wilkins "probably" had sex with other children caused the jury to believe he raped her, when it would not have otherwise.

As further evidence of this, Wilkins' attorney utilized these statements to bolster his claim that the N.H. had been put up to accusing Wilkins of the crime by her mother. During closing argument Wilkins' attorney argued:

> [S]he gives a surprising amount of detail: 'We're here to talk about Eddie and the bad things he did to me. *He does bad things to kids.* He did a bad thing to me. He needs to be stopped.' She says no one tod her why she was going there. No one talked to her about Eddie. Her mom says, 'I didn't talk about Eddie, except to say, 'Well, you're going to talk about Eddie,' and that's it.' *Somebody has put some very specific thoughts into this kid's head.*

RP at 569 (emphasis added). Thus, not only was this evidence of minimal import compared to the other evidence in the case, but Wilkins' attorney thought it valuable to remind the jury of this evidence during closing argument as a way of bolstering his claim that the crime had been planted in her head. Thus, the introduction of this evidence was of such limited value in the case against Wilkins that even his attorney thought would be helpful it building his defense. For this reason, there is not a reasonable likelihood that its introduction affected the outcome of the trial.Error! Bookmark not defined.

D. THE EXHIBIT WILKINS CLAIMS HIS ATTORNEY WAS INEFFECTIVE FOR NOT OBJECTING TO WAS NEVER ADMITTED DURING THE TRIAL.

Wilkins mistakenly argues that Exhibit 3 was admitted at trial showing his medical records were from the Department of Corrections ("DOC"), when in fact Exhibit 3 was the compact disc containing the forensic interview of N.H.; because the evidence Wilkins complains of was not admitted at trial, his argument for ineffective assistance of counsel fails. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). At the beginning of the trial on May 13, 2015, just prior to playing the video of the N.H.'s forensic recording, the State moved for its admission, and the court admitted this exhibit.[12] RP at 286; CP at 96. In his brief Wilkins' asserts that Exhibit 3 was his unredacted medical record from DOC. *Appellant's Brief* at 23. However, Wilkins' medical records were marked as Exhibit 3 for the *Ryan* Hearing on May 8, 2015, and were never admitted during the trial. CP at 86. Because

[12] Only three exhibits were admitted at trial, they were the two anatomically correct pictures of a male and female body where N.H. identified Wilkins' "bad spot" as his penis and her "bad spot" as her vagina and the disc containing N.H.'s forensic interview. Supp. Desig. CP at 96.

Wilkins' DOC medical records were not admitted at trial, his argument fails.

E. BECAUSE THE STATE HAS NOT SOUGHT APPELLATE COSTS, THE ISSUE IS NOT CURRENTLY BEFORE THIS COURT.

Because the State has not attempted to recoup appellate costs in this case, the appellate cost issue raised in Wilkins' supplemental brief is not ripe for review at this time. "[A]ny constitutional issues that might be raised with regard to penalties imposed are not presently ripe for review. It is only when the State attempts to collect ... payment ordered by the trial court that such issues may arise." *State v. Phillips*, 65 Wn.App. 239, 244, 828 P.2d 42 (1992). RCW 10.73.160 permits the court to require a person convicted of a crime to bear the responsibility of paying his or her appellate costs. Prior to an award of appellate costs being ordered, two things must occur. First, because the statutory provision authorizing recoupment of appellate costs requires a conviction, a conviction must first be affirmed. *See* RCW 10.73.160(1). Second, the State must request the award of appellate costs according to the rules of appellate procedure. *See* RCW 10.73.160(3); RAP 14.

It is well-settled that the relevant time to address the issue of payment of costs is at "the point of collection and when sanctions are sought for nonpayment." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d

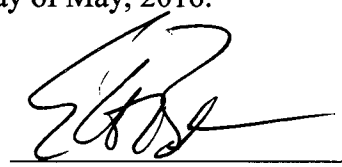
1213 (1997). In *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), the Supreme Court ruled that the trial court erred by imposing legal financial obligations without conducting an inquiry into the defendant's ability to pay. Subsequently, Division One of the Court of Appeals refused to award appellate costs that were sought by the State when the record caused the court to conclude the indigent appellant's financial condition was not likely to improve. *State v. Sinclair*, --- Wn.App. ---, --- P.3d ---, 2016 WL 393719 (2016).

Here, unlike *Sinclair*, the State has not sought appellate costs. There is no need to conduct an inquiry into Wilkins' ability to pay until the State attempts to recoup appellate costs. Should the State later seek an order for recoupment of appellate costs, then Wilkins would be permitted to oppose them at that time. However, until such time as the award of these costs is sought, his argument regarding appellate costs should not be considered.

V. CONCLUSION

For the above stated reasons, Wilkins' convictions should be affirmed.

Respectfully submitted this 16th day of May, 2016.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 16th, 2016.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 16, 2016 - 4:40 PM

Transmittal Letter

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